



DATE: 20 November 1987
CASE NO. 87-INA-633

IN THE MATTER OF

Creative Plantings,
Employer

on behalf of

Ana Leoner Hercules,
Alien

BEFORE: Litt, Chief Judge; Vittone, Associate Chief Judge; and Brenner, DeGregorio, Fath,
Levin, and Tureck, Administrative Law Judges

DECISION AND ORDER

This proceeding was initiated by the above named Employer who requested review, pursuant to 20 C.F.R. Section 656.26, from the determination of a Certifying Officer of the U.S. Department of Labor denying an application for labor certification which the Employer submitted on behalf of the above named Alien, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(14) [hereinafter, the Act.]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work (1) there are not sufficient workers in the United States who are able, willing, qualified, and available for employment and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter, AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The alien worked for the employer as an assistant floral designer from August 1984 to August 1985 and as a floral designer from August 1985 to the present. The application for alien employment certification [hereinafter referred to as application] is dated 17 April 1986 and seeks certification for employment of the alien as a floral designer.

The employer advertised the position three times in the Washington Times and posted notice of the opportunity at the place of employment between 28 March 1986 and 7 April 1986. The advertisement in the Washington Times referred applicants to the Maryland Department of Employment and Training [hereinafter referred to as DET].¹ There were no referrals from DET.¹

The certifying officer found the requirement of one year of experience excessive. (Notice of Findings). The alien was hired in 1984 without any prior experience. The certifying officer found that the employer had failed to distinguish the duties of an assistant floral designer from those of a floral designer within its organization. He ordered the employer to either: 1) show, by means of independent data supporting the employer's assertions, that the two positions were distinct occupations at Creative Designs; or 2) show that the alien had a year of experience when he was hired in August of 1984; or 3) that it was a business necessity that the applicant have at least one year of experience. In the alternative, the certifying officer ordered the employer to delete the requirement of one year of experience and readvertise the position.

The employer chose not to delete the requirement and readvertise. Instead, the employer submitted an affidavit from its greenhouse manager explaining the duties of a hypothetical floral designer, and a hypothetical assistant floral designer. A floral designer plans, designs, and arranges plants, flowers, and landscapes, and supervises his assistants as they implement his designs. The assistant floral designer merely implements the plans and designs of the floral designer. The affidavit did not state how the duties of the alien changed when she was promoted to floral designer.

The certifying officer denied the certification finding that the employer failed to show: 1) that floral designer and assistant floral designer are distinct positions at Creative Designs; and 2)

¹ The DET's job order contains a requirement that the applicant have one year of experience, but does not specify what kind of experience the applicant should have. The application specifies that the applicant should have one year of experience as an assistant floral designer. It is unclear whether or not the application was incorporated into the job order. Thus, it is unclear whether applicants for the job were told that a year of experience as a floral designer was required, or that a year of experience as an assistant floral designer was required. The certifying officer treated the job order as if it stated that a year of experience as an assistant floral designer was required.

that the experience requirement was based on business necessity. The certifying officer noted that the employer had not supplied independent data such as official position descriptions or evidence of salary differences in support of its assertions. The certifying officer further noted that the position offered to the alien did not include supervisory duties, although such duties were included in the employer's description of the duties of a floral designer.

The employer concedes that the alien would not have supervisory duties as a floral designer but requests review by this office on the grounds of business necessity. The employer cites its present need for high-level decisionmakers in its organization. It notes that the Notice of Findings did not specifically request official position descriptions or evidence of salary differences and states that assistant floral designers earn \$4.00 per hour and floral designers earn \$5.50 per hour.

CONCLUSION

The employer was instructed in the Notice of Findings to supply independent data supporting its assertions that the position advertised (floral designer) was significantly different from the position of assistant floral designer. The employer failed to do so. The employer has specifically failed to demonstrate that the alien would perform duties that are different from the duties she performed as assistant floral designer. For example, the alien would not supervise other employees as a floral designer, although the employer's own description of the position of floral designer makes it clear that supervision of others is an integral part of the job.

Thus, the employer has failed to provide persuasive evidence that it needs a floral designer who has at least one year of experience rather than an assistant floral designer who has no experience. The requirement that applicants for the job have a year of experience is therefore excessive, especially in light of the employer's demonstrated willingness to hire assistant floral designers with no experience. The certifying officer's denial of certification should therefore be affirmed.

ORDER

It is adjudged and ordered that the certifying officer's denial of Creative Plantings' application for certification of alien employment be, and is hereby, affirmed.

George A. Fath
Administrative Law Judge